

No. 86-1069

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

JOHN WAGNER, et al., *Petitioners*,

vs.

JOSEPH BRAZAS, et al., *Respondents*.

ANSWER TO PETITION FOR A WRIT OF
CERTIORARI TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA [SECOND APPELLATE
DISTRICT, DIVISION TWO]

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
DISCUSSION :	
1. THE FIRST AMENDMENT DOES NOT PRE- CLUDE THE ADMISSION OF SPEECH AS EVIDENCE OF CIVIL CONSPIRACY.	2
2. <i>N.A.A.C.P. V. CLAIBORNE HARDWARE</i> IS IN- APPLICABLE ON THE ISSUE OF LIABILITY OF A NATIONAL ORGANIZATION, AS THE RECORD DOES NOT SHOW A DISTINCT NA- TIONAL ORGANIZATION WHICH DISAP- PROVED A LOCAL ACTION.	4
3. FINDINGS IN SUPPORT OF LIABILITY OF INDIVIDUAL PETITIONERS SATISFIED AP- PLICABLE CONSTITUTIONAL CRITERIA, SINCE THE EVIDENCE ESTABLISHED THAT THE GROUP POSSESSED UNLAWFUL GOALS AND THE PETITIONERS HAD SPE- CIFIC INTENT TO FURTHER THESE GOALS.	5
4. THE TRIAL COURT FINDING OF CON- TEMPT RAISES NO FREEDOM OF ASSOCIA- TION ISSUE, SINCE THE MATTERS AT IS- SUE WERE RAISED BY PETITIONERS ON DIRECT EXAMINATION.	7
5. PRIOR RESTRAINT ON EXPRESSION IS IR- RELEVANT TO THE ISSUE OF CIVIL LIA- BILITY FOR PERSONAL INJURY.	7
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES:

<i>N.A.A.C.P. v. Claiborne Hardware</i> (1982) 458 U.S.	
886	1, 3, 4, 5, 6
<i>Noto v. United States</i> (1961) 367 U.S. 290	6

RULES:

Rule 17 of the Rules of the Supreme Court of the United States	8
Rule 17.1 of the Rules of the Supreme Court of the United States	1
Rule 17.1(c) of the Rules of the Supreme Court of the United States	1

INTRODUCTION

Joseph Brazas, et al., respondents in the above entitled action, oppose the Petition for Writ of Certiorari submitted by John Wagner, et al.

The Petition fails to satisfy the standard governing review on certiorari set forth in Rule 17.1 of the Rules of the Supreme Court of the United States (28 United States Code), that "a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Petitioners' arguments appear to be designed to fit the criteria stated in Rule 17.1 (c), which provides that review will be considered "when a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." Upon careful examination, the issues of federal law raised by the Petition are illusory. Purported conflict with the U.S. Supreme Court decisions noted by petitioners are reconcilable in each instance.

The arguments upon which the Petition is based can be stated most consistently with Rule 17.1 in the following manner:

1. The admission of constitutionally protected speech as evidence of civil conspiracy conflicts with the decision in *N.A.A.C.P. v. Claiborne Hardware* (1982) 458 U.S. 886.
2. Liability of a national political organization for local actions conflicts with *N.A.A.C.P. v. Claiborne Hardware, supra*.

3. Liability of individual defendants for conspiracy was imposed pursuant to evidence insufficient to meet standards set by U.S. Supreme Court decisions.

4. The trial court's finding of contempt against witnesses who refused to answer questions on cross examination abridged petitioners' First Amendment rights to freedom of association.

5. Petitioners had been denied freedom of speech prior to inflicting the injuries which were the subject of this litigation.

Review by this Court is not necessary, since no important question of federal law has been raised, and no irreconcilable conflict with applicable decisions of this Court has been shown.

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DISCUSSION

1. THE FIRST AMENDMENT DOES NOT PRECLUDE THE ADMISSION OF SPEECH AS EVIDENCE OF CIVIL CONSPIRACY.

Included as part of the evidence of civil conspiracy admitted at trial were various political slogans and expressions used at prior meetings of the Progressive Labor Party. Petitioners contend that as a result of the admission into evidence of constitutionally protected speech, "the jury's verdict was impermissibly tainted by reliance on political expression which should not have formed any part of the basis for liability for damages" (Petition, page 41). Petitioners argue that the admission of such evidence con-

flicts with this Court's decision in *N.A.A.C.P. v. Claiborne Hardware* (1982) 458 U.S. 886, which holds that "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages" (458 U.S. at 917-918).

N.A.A.C.P. v. Claiborne Hardware is inapposite to the present circumstances. In that case, plaintiffs sought recovery of economic losses to business establishments resulting from a boycott by a civil rights organization. In that case, the damages were a direct consequence of the constitutionally protected expression. In the present case, personal injuries violently inflicted by petitioners provided the basis for recovery. Elaborating on the "restraints" imposed by the presence of constitutionally protected activity this Court concluded that "while the state may legitimately impose damages for the consequences of violent conduct, it may not award compensation for the consequences of non-violent, protected activity" (458 U.S. at 918).

In the present case, the role of constitutionally protected expression is limited to evidence of civil conspiracy. If constitutionally protected expression were not admissible as evidence of civil conspiracy, there would be virtually no remaining source to prove this tort under any imaginable circumstance.

2. **N.A.A.C.P. V. CLAIBORNE HARDWARE IS IN-APPLICABLE ON THE ISSUE OF LIABILITY OF A NATIONAL ORGANIZATION, AS THE RECORD DOES NOT SHOW A DISTINCT NATIONAL ORGANIZATION WHICH DISAPPROVED A LOCAL ACTION.**

Petitioners argue that the liability of the "national" Progressive Labor Party for local actions conflicts with this Court's holding in *N.A.A.C.P. v. Claiborne Hardware*. Petitioners interpret this decision to preclude liability of a national organization "absent a finding that it had authorized or ratified local representatives to commit or threaten acts of violence" (Petition, page 41). In advancing this argument, petitioner misquotes the facts and holding of that case. This Court held that "the N.A.A.C.P. —like any other organization—of course may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority" (458 U.S. at 928). Plaintiffs sought to hold the N.A.A.C.P. liable for damages resulting from statements by Charles Evers, its paid representative in Mississippi. On the question of whether "Evers or any other N.A.A.C.P. member had either actual or apparent authority" from the organization to make the statements, the Court observed that "the evidence in the record suggests the contrary. . . . The statements attributed to Evers were directly contrary to N.A.A.C.P. policy" (458 U.S. at 932). The record of the present case lacks the showing of national office disapproval upon which this Court based its reasoning in *Claiborne Hardware*.

Petitioners observe that in affirming the trial court judgment, the California Court of Appeal held that the "record is devoid of any proof that these (national and local) were distinct entities" (Petition, p. 44). Petitioners contend that "in so doing, the appellate court failed to apply the criteria for liability of the national organization set forth in *N.A.A.C.P. v. Claiborne Hardware*." Since the California Court of Appeal found the evidence insufficient to establish the distinctness of any national and local entity, the criteria for liability of the national organization set forth in *N.A.A.C.P. v. Claiborne Hardware* would be inapplicable to the present case, and the court's refusal to apply such criteria was appropriate under the circumstances.

3. FINDINGS IN SUPPORT OF LIABILITY OF INDIVIDUAL PETITIONERS SATISFIED APPLICABLE CONSTITUTIONAL CRITERIA, SINCE THE EVIDENCE ESTABLISHED THAT THE GROUP POSSESSED UNLAWFUL GOALS AND THE PETITIONERS HAD SPECIFIC INTENT TO FURTHER THESE GOALS.

Petitioners request a review of individual liability of petitioners for civil conspiracy, to determine whether the lower courts failed to apply the test articulated in decisions of this Court regarding liability of individuals for participation in a conspiracy. Petitioners cite *Claiborne Hardware* for the proposition that "civil liability may not be imposed merely because an individual belongs to a group" (485 U.S. at 921), unless it is shown that "the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims" (id.). Petitioners contend that the finding of liability

against certain individual defendants shows that the lower court failed to apply standards articulated in decisions of this Court. Yet petitioners' discussion of this issue fails to show that a federal question of law was decided in conflict with a decision of this Court. Petitioners do not indicate that any individual was held liable merely because he belonged to a group, or because he lacked specific intent to further the illegal aims of such a group; rather, petitioners merely challenge the sufficiency of the evidence to support the findings of liability.

Petitioners' reliance on *Noto v. United States* (1961) 367 U.S. 290 is misplaced. Dicta in that case favored a strict test of intent in proceedings under the Smith Act (28 U.S.C. 2385), to avoid unjust criminal punishment. The *N.A.A.C.P. v. Claiborne Hardware* criteria of civil liability are satisfied by the evidence as to each petitioner in this case. Sarmiento was held liable not on account of his presence, rather on account of his participation, as shown by two photographs (See Petition, p. A-16). The liability of Mora was founded upon his assent to the unlawful goals of the group, as manifested by his presence at meetings at which the plan to use sticks was formally adopted, coupled with his possession of a stick when arrested (See Petition, p. A-15 and A-16). In contrast to the economic boycott that was the subject of *N.A.A.C.P. v. Claiborne Hardware* in which acts of violence formed an incidental byproduct of constitutionally protected political activity, the unlawful acts of violence that caused the injuries in the present case were shown by the evidence to represent a natural and intended consequence of petitioners' plan to provoke a confrontation. Since a plan to resist arrest forcibly is in itself an unlawful goal, participation in the subject confronta-

tion provides evidence of intent to further the illegal aims of the organization.

4. THE TRIAL COURT FINDING OF CONTEMPT RAISES NO FREEDOM OF ASSOCIATION ISSUE, SINCE THE MATTERS AT ISSUE WERE RAISED BY PETITIONERS ON DIRECT EXAMINATION.

Petitioners have distorted the facts of this case by asserting that disclosure of names of members or political associates was compelled. Two of petitioners' trial witnesses were found in contempt for refusing to answer proper questions on cross examination regarding matters to which they had testified in direct examination. Petitioners contend that "only a compelling state interest will suffice to overcome" the First Amendment right of association (See Petition, pages 49 and 50). The compelling state interest in this case was simply the right to cross examine a witness on a subject introduced in direct examination.

Any contrary holding would be tantamount to allowing a witness to testify, then retreat behind a First Amendment barrier to avoid cross examination about the same subject. A witness may not invoke freedom of association to achieve this unbalanced result.

5. PRIOR RESTRAINT ON EXPRESSION IS IRRELEVANT TO THE ISSUE OF CIVIL LIABILITY FOR PERSONAL INJURY.

Petitioners contend that the police admonition not to use a bullhorn, which arguably precipitated the confrontation which is the subject of this case, constituted a prior

restraint on freedom of expression. Petitioners have failed to show that they have standing to raise this issue, or that respondents are in any way responsible for the act alleged. Furthermore, petitioners do not explain what legal effect a finding that a prior restraint occurred would have upon the civil proceedings of record in this case. Petitioners have not specified what legal remedy they seek for this purported prior restraint. The issue of prior restraint would acquire relevance to this case only if petitioners assert that a prior restraint of expression gives the victim immunity from civil liability for acts of battery. Finally, petitioners have failed to indicate why this purported prior restraint presents the type of special and important reason for review that would invoke the discretion of this Court to grant the Writ of Certiorari.

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CONCLUSION

Respondents submit that review of this case will not serve the purposes of this Court as mandated by Rule 17. Accordingly, the Petition for Writ of Certiorari ought to be denied.

Dated: January, 1987

Respectfully submitted,

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